

No. 87-1803

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

UNITED STATES FIDELITY & GUARANTY  
COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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### QUESTION PRESENTED

Whether the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioner's claim that an on-scene coordinator of the Environmental Protection Agency (EPA), who was in charge of the clean-up of a hazardous waste site designated for an "immediate removal action" under the Comprehensive Environmental Response, Compensation, and Liability Act, acted negligently in directing a private contractor to proceed, notwithstanding adverse wind conditions, with the clean-up of a substance posing a major threat of fire, explosion, and release of pollutants into the air.



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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 837 F.2d 116. The opinion of the district court (Pet. App. 18a-48a) is reported at 638 F. Supp. 1068.

## JURISDICTION

The judgment of the court of appeals was entered on January 15, 1988. The petition for a writ of certiorari was filed on April 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is an insurer seeking indemnity or contribution from EPA based on the alleged negligence of EPA's on-scene coordinator in allowing a clean-up operation to proceed notwithstanding unfavorable wind conditions (Pet. App. 3a, 5a). The clean-up took place at a site designated for an "immediate removal action" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. (& Supp. III) 9601 *et seq.* (CERCLA) (Pet. App. 3a). EPA typically directs such immediate action only if it determines that a response is necessary within hours or days in order to prevent significant harm to the public health or to the environment. In this case, EPA determined that the site posed an imminent threat of fire and explosion, as well as a threat of public contact with hazardous chemicals (*id.* at 3a). The EPA's on-scene coordinator, who directed the clean-up, hired petitioner's insuree, OH Materials, an expert in toxic waste abatement and containment, to perform the various tasks required for the clean-up (*id.* at 3a-4a).

One of the most serious hazards at the site was an old railroad tank car resting on raised concrete pedestals. The tank contained oleum, a solution of sulfur trioxide in concentrated sulfuric acid, which is extremely reactive with a wide range of compounds and sensitive to moisture. At the commencement of the removal action, the oleum tank was venting directly into the atmosphere and posed a major threat of fire, explosion and release of pollutants. Pet. App. 4a.

OH Materials suggested that the tank be removed from its pedestals and transferred to a remote location or, alternatively, placed on the ground at the

rear of the site prior to neutralization and removal of the oleum. The on-scene coordinator rejected these recommendations after considering the potential risks from moving the tank. OH Materials then suggested neutralizing the oleum in the tank by slowly draining all of the liquid oleum from the tank through the bottom valve into a container of water and allowing the oleum to react with the water in a controlled fashion. The remaining sludge inside the tank would then be neutralized by slowly adding water to the tank. Following the completion of the chemical reaction, the neutralized sludge would be drained. The on-scene coordinator approved this plan. Pet. App. 4a.

While OH Materials was performing this work, drainage stopped because the valve had become clogged with sludge. To clear the valve, OH Materials employees inserted rods through the manway at the top of the tank. Following the insertion of the rods, a steam explosion occurred in the oleum tank. A large cloud of sulfur trioxide and sulfuric acid escaped out of the manway. Blown by south-southwest winds, the acid cloud migrated into the nearby town of Lock Haven, where it caused property damage to over 500 motor vehicles, an airplane, and several buildings.<sup>1</sup> Pet. App. 5a.

2. Petitioner paid the claims arising from the incident (Pet. App. 5a). It then filed suit under the Federal Tort Claims Act seeking recovery for its losses (*id.* at 5a-6a). The district court found that,

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<sup>1</sup> Eight days prior to the mishap now in issue, another release of toxic gas occurred in connection with the clean-up of the same tank. Government liability for damages resulting from the earlier incident is not in issue here since petitioner never appealed from the district court's dismissal of this aspect of its claim. Pet. App. 5a, 6a.

while the chemical release would have occurred regardless of the wind conditions, "much less" property damage would have resulted if the wind had been blowing away from Lock Haven (*id.* at 39a). The court held the United States liable for 60% of the damages caused by the chemical release based on EPA's failure to order the contractor to cease operations when wind conditions were not favorable (*id.* at 41a-42a, 48a). The court held that the contractor was also liable since, as "an expert in cleaning up hazardous wastes, [it] knew or should have known of the importance of paying attention to wind conditions and should at least have raised this point with the EPA" (*id.* at 44a). The district court found, however, that the United States had the greater share of the liability because "EPA retained the ultimate power to make decisions regarding the cleanup operations" (*ibid.*).

The district court rejected the government's contention that the discretionary function exception (28 U.S.C. 2680(a)) barred petitioner's claim. The court held (Pet. App. 33a-34a) that, while the United States had discretion to ignore the dangerous site altogether, "once it chose to clean up the hazardous wastes there, its decisions regarding the procedures to be followed were not of the nature and quality that Congress intended to shield from tort liability." "The United States," the court stated (*id.* at 34a), "must be held accountable for the acts of its workers who carry out tasks on an operational level." The district court concluded (*ibid.*) that in this instance "[t]he On Scene Coordinator's role in the cleanup operation was such that his conduct is not excluded from a claim brought pursuant to the Federal Tort Claims Act."

3. The court of appeals reversed, holding that petitioner's claim was barred by the discretionary func-

tion exception. Relying on this Court's decisions in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Dalehite v. United States*, 346 U.S. 15 (1953), the court noted (Pet. App. 10a) that "the dichotomy between planning level and operation level" relied upon by the district court "does not resolve the question of whether a governmental act is discretionary within the meaning of the exception." The proper focus is on " 'the nature of the conduct, rather than the status of the actor' " (*id.* at 11a (quoting *Varig Airlines*, 467 U.S. at 813)). "Acts at the operational level," the court explained (*ibid.*), "may be discretionary if planning level orders anticipate decisions at lower levels that leave room for policy judgment and decision."

"Execution of [the hazardous waste clean-up] program and accomplishment of its objective," the court noted (Pet. App. 12a), "necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem." EPA classified the site in question here for "immediate removal action," thus indicating that "significant risks would attend a delay in cleanup" (*ibid.*). The on-scene coordinator, charged with the responsibility of directing the project, "faced the problem of when to schedule the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air" (*id.* at 13a). The court of appeals recognized that the coordinator's decision had to reflect "not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutraliza-

tion on the day chosen against the risks of further delay" (*ibid.*).

The court of appeals stressed (Pet. App. 14a) that "[t]here was no applicable constitutional provision, statute, or regulation requiring the On Scene Coordinator to undertake removal actions only on days with favorable wind conditions." The authority delegated to the on-scene coordinator, the court stated (*id.* at 13a), "left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions." The court of appeals accordingly concluded (*id.* at 14a) that the district court erred when it sought "to second-guess the On Scene Coordinator's decision."

### ARGUMENT

1. The court of appeals' conclusion follows necessarily from this Court's decision in *Dalehite v. United States*, *supra*. In *Dalehite*, the Court applied the discretionary function exception to a fertilizer procurement and shipping program undertaken by the government in an effort to increase food production in occupied territories following the Second World War. The plaintiffs in *Dalehite* argued that the implementation of the program was negligent in a number of respects, thereby causing the explosion of a shipment of fertilizer. This Court concluded (346 U.S. at 35-36), however, that the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion." Thus, the Court held

that the exception not only barred claims that the government was negligent in adopting the program as a whole but also claims that the government was negligent in various phases of manufacturing, packaging, labeling and shipping the product and in failing to warn those handling the fertilizer of its dangerous nature.

In this case, the government was engaged not, as in *Dalehite*, in an activity creating its own hazards, but rather, pursuant to a statutory duty, in the inherently dangerous task of cleaning up environmental hazards created by others. Under CERCLA, EPA has been given broad authority to contain and eliminate hazardous wastes.<sup>2</sup> This authority is not circumscribed in any significant way, and EPA clearly has broad discretion to structure individual clean-up projects, consistently with budgetary constraints, in

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<sup>2</sup> The Act provides, in pertinent part (42 U.S.C. 9604 (a) (1)) :

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time \* \* \* or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment \* \* \* . -

The authority to act under this provision has been expressly delegated to EPA. See Exec. Order No. 12,580, 52 Fed. Reg. 2923 (1987) ; Exec. Order No. 12,316, 3 C.F.R. 168 (1981 Comp.).

accordance with its own views of sound policy. For each removal action, EPA appoints an on-scene coordinator, with full responsibility to coordinate and direct the federal removal efforts (Pet. App. 20a). There are no established guidelines or manuals that control the exercise of his discretion; instead, regulations require him to consider and balance a number of factors in making clean-up decisions.<sup>3</sup>

In the present case, the on-scene coordinator decided to proceed immediately with "the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air" (Pet. App. 13a) rather than waiting for more favorable wind conditions. That decision involved a balancing of the risks of proceeding and the risks of waiting as well as practical considerations concerning the feasibility of the project as a whole. The on-scene coordinator was required to act, based on considerations of "social, economic, and political policy" (*Varig Airlines*, 467 U.S. at 814), in accordance with his "judgment of the best course" (*Dalehite*, 346 U.S. at 34). It follows that his decision was protected by the discretionary function exception, and it is not

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<sup>3</sup> In fashioning an appropriate clean-up plan, the on-scene coordinator must document and evaluate pertinent facts concerning the discharge or release, such as its source and cause; the existence of potentially responsible parties; the nature, amount, and location of discharged or released materials; the probable direction and time of travel of discharged or released materials; the pathways to human exposure; the potential impact on human health, welfare and safety; the potential impact on natural resources and property which may be affected; priorities for protecting human health, welfare and the environment; and the cost of the operation. See 40 C.F.R. 300.33(b)(2).

within the province of the courts to second-guess that decision (467 U.S. at 814; 346 U.S. at 41).

2. Petitioner contends (Pet. 7-8) that there was no evidence that the on-scene coordinator actually made a policy determination to proceed with the neutralization of this particular hazard on the day in question. There is no requirement, however, that the policy considerations underlying the "determinations made by executives or administrators in establishing plans, specifications or schedules of operations" (346 U.S. at 35-36) be articulated in advance by the policy maker. As the court of appeals properly concluded, the factors and options here were clear and the on-scene coordinator made a conscious decision to proceed in face of the risks. In that decision there was ample "room for policy judgment and decision" (*id.* at 36).<sup>4</sup> Indeed, it is unimaginable that the decision could have been reached without such an exercise of decision-making judgment.

The district court found that this chemical plant "was one of the most hazardous sites the EPA has undertaken to clean up to this date under the Act's program" (Pet. App. 21a). The site contained more than "3,000 drums, and various reactors and tanks,

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<sup>4</sup> *Alabama Elec. Coop., Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985), upon which petitioner relies (Pet. 8-9), is not to the contrary. In that case the court held that alleged negligence by the Army Corps of Engineers in the design of a dike was not shielded by the discretionary function exception absent some indication that the design defect was the result of a policy decision. Here, the court of appeals properly concluded that the on-scene coordinator's decision to proceed in the face of the known risks "*required*[]" the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions" (Pet. App. 13a (emphasis added)).

containing hazardous chemicals" and many of these vessels were in "deteriorating condition" (*id.* at 20a). There also was ground water contamination, filled-in lagoons of chemicals, and poor air quality in the area (*id.* at 20a, 27a). The oleum tank was "[one] of the most serious hazards" (*id.* at 23a). In addition, the on-scene coordinator had a budgetary cap and a time limitation in which to complete the work (*id.* at 20a).

As the court of appeals recognized, in deciding how to schedule the clean-up operations, the on-scene coordinator was inevitably faced with "balancing the risk of proceeding with the neutralization on the day chosen against the risks of further delay" (Pet. App. 13a). He "necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to [a] specific grant of authority" (*Varig Airlines*, 467 U.S. at 820).

3. Petitioner contends (Pet. 12) that the discretionary function exception can apply only to the government's initial decision to embark on a project, not to decisions made in implementing the project. But that is plainly incorrect. As this Court clearly stated in *Dalehite*, 346 U.S. at 35-36, the discretionary function exception "includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." See also *Varig Airlines*, 467 U.S. at 811-813.

There is admittedly some disharmony among the courts of appeals in this general area. Some decisions see a material distinction between "policy" and "planning" activities, on the one hand, and "operational"

activities, on the other. These decisions stress that negligent implementation of discretionary policies and plans is not itself discretionary and therefore not within the scope of the exception, even where the alleged negligence stems from a decision concerning the proper allocation of scarce resources. See, e.g., *U.S. Fire Ins. Co. v. United States*, 806 F.2d 1529 (11th Cir. 1986) (negligent placement and maintenance of buoys by Coast Guard); *Aslakson v. United States*, 790 F.2d 688 (8th Cir. 1986) (failure of power administration to elevate power lines over lake); *Henderson v. United States*, 784 F.2d 942 (9th Cir. 1986) (negligently exposed high voltage wires); *Alabama Elec. Coop., Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985) (negligent design of dike by Army Corps of Engineers); *Drake Towing Co. v. Meisner Marine Constr. Co.*, 765 F.2d 1060 (11th Cir. 1985) (misplacement of buoys by Coast Guard); *Eklof Marine Corp. v. United States*, 762 F.2d 200 (2d Cir. 1985) (mismarking of channel by Coast Guard); *SCNO Barge Lines, Inc. v. Sun Transp. Co.*, 775 F.2d 221 (8th Cir. 1985) (misleading information in Coast Guard navigation reports).

Other court of appeals decisions, by contrast, emphasize that operational decisions may nonetheless be discretionary, and where they are—particularly where an agency concerned with resource allocation decides to do so much, and not more, in addressing a general problem or providing a product or service—such decisions should not be second-guessed in a tort suit. See, e.g., *Bowman v. United States*, 820 F.2d 1393 (4th Cir. 1987) (failure to erect guard-rail, place warning signs or close Blue Ridge Parkway during inclement weather); *C.P. Chemical Co. v. United States*, 810 F.2d 34 (2d Cir. 1987) (decision

of Consumer Product Safety Commission to ban insulation manufactured by plaintiff under Consumer Product Safety Act rather than using procedures of Federal Hazardous Substances Act); *Myslowski v. United States*, 806 F.2d 94 (6th Cir. 1986) (sale of used jeeps without warning of propensity to overturn in certain situations), cert. denied, No. 86-1389 (Mar. 30, 1987); *Pierce v. United States*, 804 F.2d 101 (8th Cir. 1986) (challenge to review process that led to allegedly wrongful termination of disability benefits); *Heller v. United States*, 803 F.2d 1558 (11th Cir. 1986) (FAA's allegedly wrongful denial of medical certificate to pilot); *Smith v. Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986) (sale of surplus asbestos "as is" without warnings or warranties); *Brown v. United States*, 790 F.2d 199 (1st Cir. 1986) (issuance of weather forecast based on incomplete information due to failure to repair or replace sporadically malfunctioning weather-reporting buoy), cert. denied, 479 U.S. 1058 (1987); *Mitchell v. United States*, 787 F.2d 466 (9th Cir. 1986) (decision not to mark power lines below 500 feet), cert. denied, No. 87-301 (Oct. 5, 1987); *Lindsey v. United States*, 778 F.2d 1143 (5th Cir. 1985) (consideration given to patent application); *Ford v. American Motors Corp.*, 770 F.2d 465 (5th Cir. 1985) (sale of used jeeps without warning of propensity to overturn in certain situations); *Spencer v. New Orleans Levee Bd.*, 737 F.2d 435 (5th Cir. 1984) (inaccurate weather forecast).

There is no clear conflict among the circuits posed by the cases in these two categories. Indeed, all circuits with decisions in the first category also have cases in the second category. While we would be prepared to argue that some of the above-cited cases

were wrongly decided,<sup>5</sup> we do not believe that they pose the sort of stark contrast of legal principle that weighs in favor of granting certiorari. As this Court has stressed (*Varig Airlines*, 467 U.S. at 813), “it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception.” The cases in this area are highly fact-specific, and the differences appear to be more of emphasis than of principle.

More immediately, this case does not present an occasion to clarify the tension among these court of appeals decisions. The court of appeals here made it very clear that the on-scene coordinator’s decision to proceed with the clean-up depended not merely on a consideration of “the resources available” but also upon a balancing of “the relative risks to the public health and safety from alternative actions” (Pet. App. 13a). The on-scene coordinator was delegated considerable discretion to make this choice based on his overall assessment of the situation. Whatever merit the distinction between policy determinations and operational decisions may have when only the proper allocation of resources to accomplish a defined objective is in question, that simplistic distinction is incapable of capturing the “nature and quality” (*Varig Airlines*, 467 U.S. at 813) of the on-scene coordinator’s actions in this case.

Petitioner is also mistaken in attempting (Pet. 13) to draw a related distinction between regulatory functions—which are within the exception—and non-regulatory or proprietary functions—which are not. That distinction was expressly rejected in *Varig Airlines*. The Court in *Varig* reaffirmed *Dalehite*, which

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<sup>5</sup> In particular, *Eklof*, *SCNO Barge*, *Drake Towing*, and *U.S. Fire Ins.* all seem to turn the Coast Guard into an insurer of safe navigation.

applied the exception outside a regulatory context, and quoted legislative history clearly stating that “‘administrative action not of a regulatory nature, such as the expenditure of Federal funds, the execution of a Federal project, and the like’” fall within the exception. 467 U.S. at 809-810, 811-813 (citations omitted). “[T]he basic inquiry concerning the application of the discretionary function exception,” the Court stressed, is simply whether the challenged acts involve “legislative and administrative decisions grounded in social, economic, and political policy” (*Varig Airlines*, 467 U.S. at 813-814). The decision how urgently to pursue and what risks to take in abating a severe and immediate hazard to health and safety implicates numerous concerns of “social, economic, and political policy.”<sup>6</sup>

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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<sup>6</sup> As the court of appeals expressly noted (Pet. App. 14a), there was no allegation in this case that the on-scene coordinator violated any EPA regulation governing removal actions. Thus, this case does not present any issue found in *Berkovitz v. United States*, cert. granted, No. 87-498 (argued Apr. 19, 1988), and there is no reason to hold this case for disposition in light of *Berkovitz*.

